

**From:** SOFTWARE by design  
**To:** Microsoft ATR  
**Date:** 1/24/02 8:25pm  
**Subject:** Attn: Renatta Hesse

# SOFTWARE *by* design

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January 21, 2002

Renata Hesse, Trial Attorney,  
Suite 1200, Antitrust Division,  
Department of Justice,  
601 D Street NW,  
Washington, DC 20530;  
[microsoft.atr@usdoj.gov]

RE: US v. Microsoft proposed final order

Dear Ms. Hesse,

In response to the invitation for public comment on the proposed consent final judgment for US v. Microsoft I offer the following thoughts from my own perspective as a software developer:

## **An Historical Overview:**

- Microsoft continually claims that it is defending its right to innovate. This is widely regarded as a cruel joke in an industry that regularly sees its best innovators attacked by Microsoft's unlawful anticompetitive behaviors.
- Microsoft's agenda isn't innovation. It seeks to impose suffocating control over user choices and expand its ever-widening monopoly.
- Microsoft is continually seeking to leverage its control over computer operating systems to gain control over technical (computer related and consumer) markets. To this end, they employ the use of restrictive contracts, strategically shifting standards, manipulation of product compatibility and other (unlawful) forms of monopolistic warfare.
- Microsoft further seeks to expand its domination by transforming the Internet into its own private network.
- One result (among others) is that companies must spend enormous resources anticipating and responding to these unlawful practices, which in turn, seriously detract from efforts to innovate or improve existing (competing) products. These very substantial costs are thus effectively hidden in the pricing and availability of competing products generally. The consuming public, in the end, unknowingly bears these costs. What do we get for our money? Mediocre/unreliable products, and a steadily shrinking array of choices.

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**Findings of Fact:**

- The findings of fact in the Microsoft case are a devastating indictment of the company. Microsoft was found to be responsible for a litany of anti-competitive and illegal practices that have harmed consumers.
- Little effort is required to discover a long and tortured history of Microsoft's evasion of antitrust enforcement and its extraordinary embrace of anticompetitive practices -- practices recognized as illegal by all members of the DC Circuit court.
- Subsequent to these events, Microsoft remains ruthless and totally unrepentant.

**The Currently Proposed Remedy:**

- The currently proposed remedies are toothless and largely cosmetic.
- The proposed final order is populated with unintelligible gibberish and fluff such as: "Microsoft may restrict an OEM from displaying icons, shortcuts or menu entries specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products." As was once remarked in an earlier time, "There is less here than meets the eye."
- The settlement contains no real penalties and actually perpetuates Microsoft's operating system monopoly.
- Among other omissions, the absence of technical disclosure practice demonstrates a complete, profound, and willing capitulation on the part of the Justice Department.
- compliance provisions in the proposed agreement embrace the most astonishingly weak oversight regime which includes
  - secrecy,
  - a guarantee of undue influence from Microsoft, and
  - a total lack of strong independent oversight.
- The proposal actually legalizes and institutionalizes the continuation of Microsoft's tight control over access to technical information, and as a result, guarantees a continuation of its monopoly power over existing markets by denying meaningful access to needed technical data by would-be competitors.

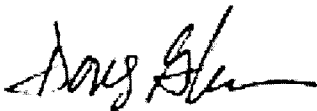
**A More Meaningful Remedy:**

- In an industry (software) with short product cycles, changing product definitions & production innovations, it is critical that any remedies address the root causes of Microsoft's unlawful practices.
- Among other things, the government must (at a minimum) require (in no particular order):
  - full support for nonproprietary Internet protocols,
  - nondiscriminatory licensing (independently enforced),
  - nondiscriminatory sharing of technical information (ie. file formats)
  - divestitures
  - no secrecy, public oversight is absolutely essential
  - meaningful restitution in proportion to the severity of the offenses.  
(this means seriously punitive fines with triple damages)

The software industry, and the consuming public which it serves, will ultimately benefit from more diversity and less monopoly. The current proposal from the Justice Department is a national embarrassment and a cause for deep shame.

Finally, both Microsoft and the DOJ, it now seems, have deliberately avoided the disclosure requirements of the Tunney Act process by submitting incomplete and misleading information. It is unlikely that the DoJ could have come up with a settlement so warmly accommodating of Microsoft without considerable coaching from Redmond.

Respectfully submitted,



Douglas N. Glenn, Ph. D.  
**SOFTWARE by design**